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When is Notice Notice - Why Missouri Should Clarify the Requirements for Notice Letters Seeking the Release of a Deed of Trust

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When is Notice Notice? Why Missouri Should Clarify the Requirements for Notice Letters Seeking the Release of a Deed of Trust

Garr v. Countrywide Home Loans, Inc.[1]

I. INTRODUCTION

The right to freely alienate one's real property has long been a cherished right in American property law.[2] Because this right is paramount, state legislatures have enacted many laws in an attempt to strongly discourage any unnecessary encumbrances on free and immediate alienation.[3] One of the most disruptive encumbrances on title occurs when a lender fails to release its security interest in a timely fashion after a borrower fulfills her obligation.[4] Many legislatures have enacted strict penalties for a lender's unlawful refusal to correct the record and clear a borrower's title in a timely manner.[5]

Complete payment of an obligation secured by a deed of trust or mortgage typically extinguishes (or "satisfies") the lien of the deed of trust.[6] However, if the lender does not record satisfaction of the lien, the continued presence of the security instrument on the public land records can potentially delay a pending sale from the owner to a new purchaser.[7] All real estate sale contracts contain an implied covenant for the seller to establish "marketable title" unless the parties agree otherwise.[8] A security interest remaining on the public land records is an encumbrance on the title and is grounds for the purchaser to deem title "unmarketable" and rescind the pending contract.[9] Simi-

1. 137 S.W.3d 457 (Mo. 2004) (en banc).

2. *See generally* JOHN CHIPMAN GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY (2d ed. 1895).

3. *See* RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 6.4 cmt. c (1997).

4. UNIF. RESIDENTIAL MORTGAGE SATISFACTION ACT prefatory note (2004).

5. RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 6.4 cmt. c; Wanda E. Wakefield, Annotation, *Damages Recoverable for Real-Estate Mortgagee's Refusal to Discharge Mortgage or Give Partial Release Therefrom*, 8 A.L.R. 4TH 853 § 2 (1981).

6. UNIF. RESIDENTIAL MORTGAGE SATISFACTION ACT prefatory note (2004).

7. Wakefield, *supra* note 5. *See* Barnett v. Bank of Malvern, 4 S.W.2d 17, 18 (Ark. 1928).

8. GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE TRANSFER, FINANCE, AND DEVELOPMENT 77 n.1 (5th ed. 1998); UNIF. RESIDENTIAL MORTGAGE SATISFACTION ACT prefatory note (2004).

9. CHAPMAN W. MAUPIN, MARKETABLE TITLE TO REAL ESTATE §§ 76, 78 (2d ed. 1907).

larly, an existing security interest may complicate an owner's efforts in refinancing an obligation if the existing interest remains on the records, as the new lender will not make a loan without being assured of obtaining the priority it expects, namely property free and clear of all preexisting encumbrances.[10]

Traditionally, the borrower cleared its title by having the lender execute and record a document evidencing satisfaction of the debt or, in a few states, by having the lender make a marginal notation of satisfaction on the page of the public land records registering the security interest.[11] Upon payoff of the full outstanding debt, these actions usually could be performed and the title cleared almost instantaneously, as the loan records were typically kept at the lender's office or a local attorney's office, and banks and other lenders kept the borrower's note in their own portfolio.[12] Generally, lenders are now less likely to be personally acquainted with borrowers than in decades past. Whereas once the lender, borrower, lawyer, and title company had offices on the same town square, this is rarely the case anymore as nationwide services have largely displaced small-town, local businesses.[13]

Due to the substantial development of the secondary market for residential mortgages and the corresponding changes in the lending, title insurance, and closing services industries, the payoff, discharge, and release of security instruments are no longer an easy, one-day affair.[14] Most lenders sell their mortgages to a secondary mortgage purchaser, such as Fannie Mae or Freddie Mac, which may be located on the other side of the country from the borrower and the mortgaged land.[15] Therefore, these lenders are usually not in a physical position to record a satisfaction immediately. In recent years, "the title insurance industry has experienced significant consolidation, with the emergence of large national title insurance companies that rely upon independent agents . . . to perform [consumer-level] functions related to the closing of real estate transactions."[16]

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10. UNIF. RESIDENTIAL MORTGAGE SATISFACTION ACT prefatory note (2004).

11. *Id. See* 55 AM. JUR. 2D *Mortgages* § 430; ROBERT KRATOVIL & RAYMOND J. WERNER, MODERN MORTGAGE LAW AND PRACTICE § 34.05(c), (e) (2d ed. 1981). A security interest may be in the form of either a mortgage or a deed of trust. While the mortgage was the more traditional form, today more than half of the states allow deeds of trust. GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW 512 (3d ed. 1994).

12. UNIF. RESIDENTIAL MORTGAGE SATISFACTION ACT prefatory note (2004); Trovillion v. Countrywide Funding Corp., 910 S.W.2d 822, 823-24 (Mo. Ct. App. 1995).

13. *See Trovillion*, 910 S.W.2d at 823-24.

14. UNIF. RESIDENTIAL MORTGAGE SATISFACTION ACT prefatory note (2004).

15. *Id.*; KRATOVIL & WERNER, *supra* note 11, § 1.10.

16. UNIF. RESIDENTIAL MORTGAGE SATISFACTION ACT prefatory note (2004); KRATOVIL & WERNER, *supra* note 11, § 1.12.

Due to this nationwide consolidation, borrowers and lenders rarely know one another personally, leading to more caution in executing a release on a secured interest.[17] Furthermore, because of the predominant practice of selling mortgages on the secondary market, obtaining the necessary release can be complicated by a borrower's uncertainty about the identity or location of the lender.[18] Since the mid-1980s, merging and consolidation of lenders and title insurers has made it increasingly difficult for a borrower to even know who holds her mortgage without some investigation.[19] The longer a mortgage remains outstanding, the greater the likelihood of such problems, as the bank which made the initial loan could very well be out of business by the time the borrower seeks a release.

Due in part to these increasing difficulties, all fifty states and most U.S. territories have enacted statutes providing penalties for a lender's failure to supply a timely deed of release to the borrower once the borrower requests such a release.[20] In *Garr v. Countrywide Home Loans, Inc.*,[21] the Supreme Court of Missouri considered what elements must be present in a borrower's request in order to invoke Missouri's statutory penalty for failure to supply a timely deed of release.[22]

II. FACTS AND HOLDING

On August 8, 2002, Joseph and Marianne Garr, husband and wife, refinanced a loan which had been secured by a deed of trust held by Countrywide Home Loans ("Countrywide").[23] Mr. Garr, an attorney in the St. Louis area,[24] mailed the full payoff amount of their promissory note to Countrywide, who received it on August 8, 2002.[25] The same day, he sent a certified letter, return receipt requested, to Countrywide's Payoff Processing Department in Plano, Texas.[26] The letter stated:

> On August 2, 2002, we closed on our Marlann Drive home. On August 8, 2002, I confirmed via the Countrywide Automated Customer Service Line that our loan with Countrywide Home Loans was paid in full on August 8, 2002 and that an escrow balance of $60.84 would be refunded to me. We still have not received a Deed

17. UNIF. RESIDENTIAL MORTGAGE SATISFACTION ACT prefatory note (2004).
18. *Id.*
19. *Id.*
20. RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 6.4 cmt. c, tbl. (1997); KRATOVIL & WERNER, *supra* note 11, § 34.05(g).
21. 137 S.W.3d 457 (Mo. 2004) (en banc).
22. *Id.* at 460.
23. *Id.* at 458.
24. *See* Brief of Appellant/Cross-Respondent at *14-15, *Garr* (No. SC85578).
25. *Garr*, 137 S.W.3d at 458.
26. *Id.*

> of Release to release the lien against our personal residence at 1417 Marlann Drive, Des Peres, Missouri 63131.
>
> We are demanding immediate release of the Deed of Trust against our Marlann Drive property. Enclosed is a check payable to your institution in the sum of $30.00 to cover the costs of filing and recording the Deed of Release regarding the transaction. Please deliver in hand to me evidence of the release of the Deed of Trust. In the event the Deed of Release has already been sent, please return my check to above listed address.[27]

The Payoff Processing Department received the letter and check on August 12, 2002.[28] That same day, a California affiliate of Countrywide prepared and executed a deed of release that instructed the St. Louis County Recorder of Deeds to send the recorded deed to the Garrs' home address.[29] But although the affiliate mailed the deed of release to the Recorder of Deeds to be recorded, Countrywide did not send a copy of the deed of release to the Garrs.[30] Instead, the company returned Mr. Garr's $30.00 on August 14, 2002, "explaining that his loan was paid in full and additional funds were unnecessary."[31] The St. Louis County Recorder of Deeds recorded the deed of release on August 26, 2002, the tenth business day after Countrywide received Mr. Garr's August 8 letter.[32]

On September 3, 2002, the fifteenth business day following Countrywide's receipt of his August 8 letter,[33] Mr. Garr sent a second letter to the Payment Processing Department, stating his intention to seek damages for

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27. *Id.* at 458-59.
28. *Id.* at 459.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* The statute in effect at the time authorizing a penalty for failure to submit a release was somewhat ambiguous as to the time restraints for sending the release. The statute stated that a lender must deliver a sufficient deed to the person making satisfaction "within fifteen business days [of] request and tender of cost[]." MO. REV. STAT. § 443.130 (2000) (amended 2004). It is unclear whether the legislature intended this to mean that the fifteen business days are triggered upon the *mailing* of a demand letter or the lender's *receipt* of the letter, and if the lender must *send* a release or the person making satisfaction must *receive* the release within fifteen business days of such an event. Throughout the opinion, the court treats the statute as though the fifteen business days are triggered upon *the lender's receipt* of the letter, and that the person making satisfaction must *receive* the release within fifteen business days.
33. "Because September 2, 2002 was Labor Day, September 3, 2002 was the fifteenth (15th) business day following Countrywide's receipt of Mr. Garr's August 8, 2002 letter." Brief of Appellant/Cross-Respondent at *14 n.2, *Garr* (No. SC85578). *See* MO. REV. STAT. § 443.130.1 (2000) (amended 2004) (defining a business day as "any day except Saturday, Sunday and legal holidays").

Countrywide's violation of MO. REV. STAT. § 443.130.[34] The statute authorized "penalties for failing to [deliver] a sufficient deed of release" to the person making satisfaction of the debt within fifteen days of a request by the person making satisfaction of the loan sometime after the satisfaction occurs.[35] He demanded Countrywide's "immediately tender" of a check for $16,500.00[36] and delivery of a "sufficient deed of release" within ten days.[37] Garr threatened to file suit if Countrywide failed to take such action.[38] Countrywide's California affiliate sent a copy of the deed of release to the Garrs on September 12, 2002,[39] the twenty-second business day after Countrywide's receipt of the August 8 demand letter.[40]

The Garrs sued Countrywide under Section 443.130 in St. Louis County Circuit Court on November 13, 2002, seeking to recover the statutory penalty for failure to execute and deliver a timely deed of release.[41] Both parties moved for summary judgment and agreed to have the court rule on the motions and briefs in lieu of a trial.[42] The court ruled for the Garrs but denied their request for prejudgment interest and attorneys' fees.[43] Both parties appealed.[44]

The Missouri Supreme Court held that the Garrs' August 8 letter demanding immediate release of the deed of trust and recording of a deed of release was insufficient to invoke Section 443.130.[45] Therefore, because Countrywide had no valid notice that the Garrs were invoking the statute, the court held that Countrywide could not be penalized for failing to deliver a timely deed of release.[46]

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34. *Garr*, 137 S.W.3d at 459.

35. *Id. See also* MO. REV. STAT. § 443.130.1 (2000) (amended 2004).

36. This amount corresponds to the statutory penalty of 10 percent of the promissory note as provided under the 2000 version of Section 443.130 of the Missouri Revised Statutes. MO. REV. STAT. § 443.130 (2000) (amended 2004).

37. *Garr*, 137 S.W.3d at 459.

38. *Id.*

39. *Id.*

40. Brief of Appellant/Cross-Respondent at *14-15, *Garr* (No. SC85578).

41. *Garr*, 137 S.W.3d at 459.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 460.

46. *Id.*

III. LEGAL BACKGROUND

A. The Deed of Trust as a Security Interest

"A 'mortgage' is a lien on real estate."[47] Mortgages are seldom used in Missouri,[48] where lending institutions overwhelmingly favor the deed of trust.[49] A deed of trust is essentially a substitute for a mortgage, in the form of a conveyance from a landowner to a trustee for the purpose of securing an obligation to the beneficiary of the trust.[50] The deed of trust is favored because it allows a rapid foreclosure procedure through Missouri's statutory power of sale.[51]

B. The History of Deeds of Release in Missouri

Although a deed of trust takes the form of a conveyance from the grantor to the trustee, in Missouri no reconveyance or other act by the trustee is necessary to release the deed of trust.[52] The beneficiary, without any action by the trustee, may release the deed of trust by delivering a deed of release.[53]

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47. RANDELL D. WALLACE, 2 MO. REAL ESTATE PRACTICE § 10.2 (MoBar 4th ed. 2000).

48. *Id.*; 18 THEODORE H. HELLMUTH, MISSOURI PRACTICE, REAL ESTATE LAW—TRANSACTIONS § 256 (2d ed. 1998).

49. HELLMUTH, *supra* note 48, §§ 256, 258.

50. *Id.* § 257.

51. *Id.* § 256. *See also* MO. REV. STAT. §§ 443.290, 443.310-.330 (2000). "A 'mortgagor,' 'trustor,' or 'grantor' in a mortgage or deed of trust is the borrower, or debtor, in the transaction." WALLACE, *supra* note 47, § 10.2. "Trustee" refers to the "grantee" in a deed of trust. The trustee "theoretically holds title to the real property of the [borrower] for the benefit of the mortgagee." *Id.* "'Mortgagee,' 'grantee,' 'cestui que trust,' or 'beneficiary,' refers to the lender or secured party in the transaction." *Id.*

52. MO. REV. STAT. § 443.060.1 (2000).

53. RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 6.4 cmt. c (1997); STINSON, MAG & FIZZELL, MO. PRAC.: METHODS OF PRACTICE: TRANSACTION GUIDE § 8.56 (4th ed. 2001) [hereinafter STINSON]. An older method of effectuating release was for the trustee to release the deed of trust by acknowledging satisfaction on the margin of the record at the county recorder's office. *Id.* However, with the advent of electronic records this is no longer feasible in many counties and the method fell out of favor in the industry. *Id.* "As a result of the 1991 and 1994 amendments to the statutes governing satisfaction and release, the beneficiary may no longer acknowledge satisfaction" by notation on the record. *Id.*; *see* MO. REV. STAT §§ 443.060, 443.090, 443.100, 443.130-.170 (2000 & Supp. 2004). For several decades, Missouri statutes required that the note or other evidence of the secured indebtedness be presented to the recorder for identification at the time of the recording of the deed of trust and that the note also be presented at the time of the release of the deed of trust. STINSON, *supra*, § 8.56. This is no longer required. MO. REV. STAT. § 443.130 (Supp. 2004) (effective

Missouri courts have strictly construed Missouri Revised Statutes Section 443.130 "to require that the [recording] costs be tendered to the holder of the note and deed of trust,"[54] and if the closing agent withholds the recording fees at closing but does not submit them to the beneficiary, the borrower is not entitled to collect the penalty.[55] "In a refinancing transaction, loan closing practices have developed in which the grantor does not, as a matter of course, tender [recording fees] to the existing [lender]."[56] However, "unless the grantor tenders the recording fee to the existing lender, the grantor cannot collect the statutory penalty if the release is not" filed in a timely manner.[57]

Missouri's statutes impose a substantial penalty on a lender who fails to release a deed of trust upon satisfaction of the debt it secures.[58] Under the penalty statute in effect at the time the Missouri Supreme Court decided *Garr*,[59] a lender who failed to release its deed of trust and deliver the release to the borrower within fifteen business days of a valid request forfeited 10 percent of the face amount of the security instrument and any other damages that the person may be able to prove he had sustained.[60]

To qualify for the 10 percent penalty, the borrower must have sent notice of satisfaction of the debt to the lender by certified mail, return receipt requested, with good and sufficient evidence that the debt was satisfied with

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Aug. 28, 2004). "However, in the case of deeds of trust recorded prior to January 1, 1986, the note still must be produced and (for a satisfaction in full) cancelled in the presence of the recorder." STINSON, *supra*, § 8.56 (citing MO. REV. STAT. § 443.060.1 (2000)); *see* Masterson v. Roosevelt Bank, 919 S.W.2d 9 (Mo. Ct. App. 1996)).

54. STINSON, supra note 53, § 8.56 (citing Trovillion v. Countrywide Funding Corp., 910 S.W.2d 822, 824 (Mo. Ct. App. 1995) (citing Perrin v. Johnson, 124 S.W.2d 551, 555 (Mo. Ct. App. 1939))); *see* MO. REV. STAT. § 443.130 (Supp. 2004).

55. Trovillion v. Chemical Bank, 916 S.W.2d 863, 865 (Mo. Ct. App. 1996).

56. STINSON, *supra* note 53, § 8.56 (citing Murray v. Fleet Mortgage Corp., 936 S.W.2d 212, 218 (Mo. Ct. App. 1996)).

57. *Id.*

58. *See* MO. REV. STAT. § 443.130 (2000) (amended 2004).

59. The legislature revised the penalty statute in 2004 (*see infra* Part C).

60. The version in effect at the time of the Garrs' conflict, the 2000 version of Section 443.130.1 of Missouri Revised Statutes, stated in pertinent part,

> If any such person, thus receiving satisfaction, does not, within fifteen business days after request and tender of costs, deliver to the person making satisfaction a sufficient deed of release, such person shall forfeit to the party aggrieved ten percent upon the amount of the security instrument, absolutely, and any other damages such person may be able to prove such person has sustained, to be recovered in any court of competent jurisdiction. A business day is any day except Saturday, Sunday and legal holidays.

MO. REV. STAT. § 443.130.1 (2000) (amended 2004).

good funds,[61] and must have advanced sufficient funds to pay the expense of recording the deed of release.[62]

C. The New Revision

During the spring of 2004, the Missouri General Assembly substantially altered Section 443.130.[63] Under the new statute, which became effective

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61. Missouri statutes do not specifically define "good funds," but other states generally define the term to mean any type of transfer of money in which the transferee is in complete and irrevocable possession of the funds. A personal check is generally not considered "good funds" until it clears the bank upon which it was drawn, as the funds are not in complete and irrevocable possession of the funds until such point in time. For example, Nebraska defines "good funds" as cash, wired funds, cashier's checks, certified checks, bank money orders, or teller's checks, as well as several government-issued forms of checks. NEB. REV. STAT. § 44-19,116(1)(e)(i)(A)-(D) (2004). Ohio's statute uses substantially the same definition, but also includes personal checks under $1000. OHIO REV. CODE ANN. § 1349.21 (Anderson 2002). West Virginia's "Good Funds Settlement Act" defines "good funds" as funds "deposited and irrevocably credited" with the transferee. W. VA. CODE § 46A-6K-2 (Supp. 2004) (effective June 8, 2004). In *Martin v. STM Mortgage Co.*, 903 S.W.2d 548 (Mo. Ct. App. 1995), the Missouri Court of Appeals for the Western District invalidated a demand letter due to its failure to prove when an uncertified check was paid.

62. The version in effect at the time of the Garrs' conflict, the 2000 version of Section 443.130.2 of Missouri Revised Statutes, stated in pertinent part,

> To qualify under this section, the mortgagor shall provide the request in the form of a demand letter to the mortgagee, cestui qui trust, or assignee by certified mail, return receipt requested. The letter shall include good and sufficient evidence that the debt secured by the deed of trust was satisfied with good funds, and the expense of filing and recording the release was advanced.

MO. REV. STAT. § 443.130.2 (2000) (amended 2004).

63. The legislature enacted the new statute on June 14, 2004. *See* Act of June 14, 2004, No. 959, § A, 2004 Mo. Legis. Serv. 10 (West). See also MO. REV. STAT. § 443.130 (Supp. 2004) (effective Aug. 28, 2004), which states, in pertinent part,

> 1. If the secured party, receiving satisfaction for the debt secured pursuant to this chapter, does not, within forty-five days after request and tender of costs, submit for recording a sufficient deed of release, such secured party shall be liable to the mortgagor for the lesser of an amount of three hundred dollars a day for each day, after the forty-fifth day, that the secured party fails to submit for recording a sufficient deed of release or ten percent of the amount of the security instrument, plus court costs and attorney fees to be recovered in any court of competent jurisdiction. In the event a document submitted for recording by a secured party is rejected for recording for any reason, such secured party shall have sixty days following receipt of notice that the document has been rejected in which to submit a recordable and sufficient deed of release.
>
> 2. To qualify under this section, the mortgagor or his or her agent shall provide the request in the form of a demand letter to the secured party by

August 28, 2004,[64] a borrower must send notice to the lender by certified mail, return receipt requested, or in another form that provides the borrower with evidence of the date that the lender receives the notice.[65] The 2004 revision to Section 443.130 eliminated the duty to deliver a deed of release to the person satisfying the debt and replaces it with a duty to submit the deed of release for recording.[66]

The revision also substantially altered the time frame for release as well as the penalties under the statute.[67] The lender now has forty-five days[68] in which to submit the deed of release for recording.[69] A non-complying lender is now liable for either $300 for each day that the secured party fails to submit a sufficient deed of release for recording after the forty-fifth day *or* 10 percent of the amount of the security instrument, whichever is *less*.[70] The secured party would also be liable for court costs and attorney fees if litigation should ensue.[71]

The ultimate purpose of Section 443.130 is to enforce the duty of the lender to clear the borrower's title so that the record is no longer encumbered.[72] This statute is an enforcement mechanism for Section 443.060.01, which requires a lender to deliver a "'sufficient deed of release of the security instrument'" upon satisfaction of the instrument.[73] Due to the penal nature of

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> certified mail, return receipt requested or in another form that provides evidence of the date of receipt to the mortgagor. The letter shall include good and sufficient evidence that the debt secured by the deed of trust was satisfied with good funds, and the expense of filing and recording the release was advanced.

MO. REV. STAT. § 443.130.

64. MO. REV. STAT. § 443.130.

65. *Id.* § 443.130.2.

66. *See* Act of June 14, 2004, No. 959, § A, 2004 Mo. Legis. Serv. 10 (West).

67. *See id.*

68. MO. REV. STAT. § 443.130.1 (Supp. 2004). Note that this is a change from the previous requirement to count only "business" days. *See* MO. REV. STAT. § 443.130.1 (2000) (amended 2004).

69. MO. REV. STAT. § 443.130.1 (Supp. 2004).

70. *Id.*

71. *Id.*

72. Ong Bldg. Corp. v. GMAC Mortgage Corp., 851 S.W.2d 54, 55 (Mo. Ct. App. 1993).

73. *Id.* at 55 (quoting MO. REV. STAT. § 443.060.1 (2000)). Section 443.060.1 of the Missouri Revised Statutes states, in pertinent part,

> If any mortgagee, cestui que trust or assignee, or personal representative of the mortgagee, cestui que trust or assignee, receive full satisfaction of any security instrument, he shall, at the request and cost of the person making the same, deliver to such person a sufficient deed of release of the security instrument . . . .

MO. REV. STAT. § 443.060.1.

Section 443.130, courts construe it strictly.[74] "Therefore, any demand letter purporting to invoke section 443.130 should closely track the language of the statute to place the [lender] on [sufficient] notice that the" borrower is making a statutory demand.[75]

D. Security Instrument Releases in Other States

As the lending market has become more consolidated and nationwide, borrowers have encountered greater difficulty in obtaining a prompt release of their security instruments.[76] All fifty states now have statutes requiring lenders to promptly provide title-clearing documentation following repayment of the secured debt.[77] To allow time for the lender to verify the satisfaction and account for the growing geographic and bureaucratic distances between lender and borrower, existing state statutes typically allow the lender a "grace period" for recording a satisfaction.[78] Due to the nonuniform enactment of existing state laws, requirements and penalties vary widely from state to state.[79] Many impose extremely short deadlines that push the bounds of practicality, even when a lender acts in good faith.[80] Others allow grace periods that far exceed the time necessary for a lender to record a satisfaction.[81]

All fifty states permit an injured party to recover any actual loss caused by the lender's failure to record a timely satisfaction, such as contract damages flowing from failure to obtain marketable title.[82] Most states also impose statutory penalties.[83] "Theoretically, these sanctions should provide an economic incentive for the [lender] to act promptly" and allow the owner to ob-

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74. *See* BCI Corp. v. Charlebois Constr. Co., 673 S.W.2d 774, 780 (Mo. 1984) (en banc); Roberts v. Rider, 924 S.W.2d 555, 559 (Mo. Ct. App. 1996).

75. Garr v. Countrywide Home Loans, Inc., 137 S.W.3d 457, 460 (Mo. 2004) (en banc) (citing Lines v. Mercantile Bank, 70 S.W.3d 676, 679 (Mo. Ct. App. 2002)).

76. UNIF. RESIDENTIAL MORTGAGE SATISFACTION ACT prefatory note (2004).

77. *Id.* RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 6.4 cmt. c, tbl. (1997)

78. RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 6.4 cmt. c; UNIF. RESIDENTIAL MORTGAGE SATISFACTION ACT prefatory note (2004).

79. RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 6.4 cmt. c; UNIF. RESIDENTIAL MORTGAGE SATISFACTION ACT prefatory note.

80. RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 6.4 cmt. c; UNIF. RESIDENTIAL MORTGAGE SATISFACTION ACT prefatory note. For example, Idaho does not specify any time allowance. IDAHO CODE § 45-915 (Michie 2003) ("immediately").

81. RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 6.4 cmt. c., tbl. (1997); UNIF. RESIDENTIAL MORTGAGE SATISFACTION ACT prefatory note. For example, Ohio, Utah, and Virginia allow the lender ninety days. OHIO REV. CODE ANN. § 5301.36(B) (Anderson 1989); UTAH CODE ANN. § 57-1-38(3) (2000); VA. CODE ANN. § 55-66.3(A)(1) (Michie Supp. 2002).

82. UNIF. RESIDENTIAL MORTGAGE SATISFACTION ACT prefatory note.

83. *Id.*; RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 6.4 cmt. c, tbl.

tain marketable title in a timely fashion.[84] Again, due to the nonuniform nature of the state laws, statutory penalties "vary dramatically, ranging from a proverbial 'slap on the wrist'[85] that provides no real economic incentive"[86] to "draconian penalt[ies]"[87] that would result in criminal liability[88] or significant overcompensation that may provide a considerable windfall for the owner of the real estate.[89]

The requirements for notification also differ substantially from state to state.[90] In most states, the lender is liable for a statutory penalty to the borrower only if the lender fails "to record a timely satisfaction following a formal demand by the owner."[91] However, in some states the borrower must only pay off the security interest in full to trigger the lender's potential liability, and no separate notice is required.[92] To add more confusion, some states require the lender to *record* a satisfaction,[93] and other states allow the lender to either record a satisfaction or submit the satisfaction to a different person.[94]

E. The Uniform Residential Mortgage Satisfaction Act

The National Conference of Commissioners on Uniform State Laws approved the final draft of the Uniform Residential Mortgage Satisfaction Act ("the Act") in 2004.[95] "The Act provides the [lender] with 30 days to prepare and submit for recording a 'satisfaction document,' beginning at the time that the [lender] receives full payment or performance."[96] Notification is not required to trigger the thirty day period.[97] "If the [lender] fails to submit a satis-

84. UNIF. RESIDENTIAL MORTGAGE SATISFACTION ACT prefatory note; Ong Bldg. Corp. v. GMAC Mortgage Corp., 851 S.W.2d 54, 55 (Mo. Ct. App. 1993).

85. UNIF. RESIDENTIAL MORTGAGE SATISFACTION ACT prefatory note.

86. *See, e.g.*, IDAHO CODE § 45-915 (Michie 2003) and N.D. CENT. CODE § 35-01-27 (2004) (both statutes provide for a $100 penalty).

87. UNIF. RESIDENTIAL MORTGAGE SATISFACTION ACT prefatory note.

88. *See* FLA. STAT. ch. 701.05 (1994) (making a failure to deliver a timely release a second-degree misdemeanor under Florida law).

89. *See* 21 PA. CONS. STAT. ANN. § 682 (West Supp. 2004), and MISS. CODE ANN. § 89-5-21(2) (1999) (in which Pennsylvania and Mississippi set the maximum penalty as "any sum not exceeding the mortgage-money"). *See also* S.C. CODE ANN. § 29-3-320 (Law. Co-op. 1991 & Supp. 2004) (providing a penalty under South Carolina law equal to the lower of one-half of the mortgage debt or $25,000).

90. UNIF. RESIDENTIAL MORTGAGE SATISFACTION ACT prefatory note.

91. *Id.*

92. *Id.*

93. *See, e.g.*, FLA. STAT. ch. § 701.05 (1994); S.C. CODE ANN. § 29-3-320 (Law. Co-op. 1991 & Supp. 2004).

94. *See, e.g.*, IDAHO CODE § 45-915 (Michie 2003).

95. The Act was approved between July 30 and August 6, 2004, at the NCCUSL annual conference. UNIF. RESIDENTIAL MORTGAGE SATISFACTION ACT (2004).

96. *Id.* at prefatory note. *See id.* § 203(a).

97. *Id.* at prefatory note.

faction document for recording within this period, the [lender] is generally liable for any actual damages proximately caused by its failure," but is not liable for any punitive damages.[98]

"In an effort to provide an appropriate economic incentive to [lenders], the Act also authorizes the imposition of statutory damages and liability for attorneys' fees" in the event that a lender fails "to record a timely satisfaction."[99] However, the lender is not liable for statutory damages or attorneys' fees unless it has first been provided with notification of noncompliance and an opportunity to either comply with the Act or demonstrate its attempted compliance and agree to issue a duplicate satisfaction.[100] As a result, the Act provides that if a lender has failed to submit a satisfaction document for recording within the thirty-day time period, the landowner may provide notification to the lender via any method that both provides proof of receipt and demands that the creditor submit a satisfaction for recording.[101]

The Act does not explicitly require the borrower to cite or reference the statute or to specify the time limit for the lender's compliance when drafting a notification letter; however, the necessity for these steps is not expressly negated.[102] "If the [lender] fails to respond to [the final] demand within [an] additional 30 days [from receipt of the certified letter], the Act permits the owner of the mortgaged land to recover statutory damages and attorney's fees (in addition to any actual damages caused by the failure)."[103] This gives the lender a minimum of sixty days in which to record a satisfaction before incurring liability for any statutory penalty.[104]

One of the most alarming discoveries made by the Uniform Residential Mortgage Act committee in the course of its research is the fact that lenders actively engage in differential treatment of release requests received from various states based on a state-by-state analysis of grace periods and penalties for noncompliance.[105] This differential treatment of similarly-situated borrowers depending solely on the state in which the borrower resides has troubling effects, such as a tendency for states to pass ever-increasing penalties for noncompliance and reduced time periods in which to comply in an effort to procure better treatment for their citizens.[106]

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98. *Id.* at prefatory note. *See id.* § 203(b).
99. *Id.* at prefatory note, § 203 cmt. 2. *See id.* § 203(c).
100. *Id.* at prefatory note. *See id.* § 203(c).
101. *Id.* at prefatory note. *See id.* § 203(c).
102. *See id.* § 203(c)(1).
103. *Id.* at prefatory note. *See id.* § 203(c).
104. *Id.* § 203 cmt. 2.
105. *Id.* at prefatory note.
106. "[S]ince 1989, at least eleven states have increased their minimum statutory damage for untimely satisfactions" while none have reduced their minimum. *Id.* at prefatory note.

IV. INSTANT DECISION

The Supreme Court of Missouri held exclusive appellate jurisdiction of the portion of the circuit court's summary judgment decision pertaining to the alleged unconstitutionality of Missouri Revised Code Section 443.130.[107]

A. The Majority Opinion

Writing for the 5-2 majority, Judge Limbaugh focused on the adequacy of notice provided by the Garrs' August 8 letter to Countrywide.[108] He noted that "[t]he Garrs relied on *Martin v. STM Mortgage Co.*[109] for the proposition that the statutory demand need not consist of any particular form of words" in order to successfully invoke the statute.[110] While this proposition is correct, the *Garr* court stated that *Martin* was inapposite because the demand letter in *Martin* "did indeed include a recitation of section 443.130 that certainly would have placed the mortgagee on notice that the statute was being invoked."[111]

The court held that due to three technical drafting issues, Mr. Garr's letter was inadequate to place Countrywide on notice that Garr intended to invoke Section 443.130.[112] First, the letter demanded an "'*immediate* release' of the deed of trust, rather than allowing for fifteen business days in which Countrywide could respond as allowed under the statute."[113] Second, the court stated that Mr. Garr "demanded that Countrywide *record* the deed of

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107. Garr v. Countrywide Home Loans, Inc., 137 S.W.3d 457, 458 (Mo. 2004) (en banc).

108. *Id.* at 460.

109. 903 S.W.2d 548 (Mo. Ct. App. 1995).

110. *Garr*, 137 S.W.3d at 460 (citation omitted). The court in *Martin* stated,

> A demand or request to the mortgagee to enter satisfaction of the mortgage is a condition precedent to the right to sue for the statutory penalty. No particular form of words is necessary for this demand; it is sufficient if it informs the mortgagee with reasonable certainty that an entry of satisfaction of the particular mortgage is requested.

Martin, 903 S.W.2d at 550 (citing 59 C.J.S. *Mortgages* § 474(c) (1949)).

111. *Garr*, 137 S.W.3d at 460. This is perhaps the most perplexing statement in the entire *Garr* opinion. The court explicitly states that a request need not consist of any particular form of words, and then rules a case inapposite because it consisted of a particular form of words. *See also* 55 AM. JUR. 2D *Mortgages* § 440 (1996) (the notice "need not be presented in any particular form. In this respect, it is generally held that a demand to satisfy is sufficient which calls to the attention of the mortgagee the fact that the indebtedness secured by the mortgage has been paid, and requests in consideration of that payment that a satisfaction of the mortgage be executed or entered. The language of the notice must, however, in its fair and reasonable meaning, inform the mortgagee as to what is desired . . . .").

112. *Garr*, 137 S.W.3d at 460.

113. *Id.*

release,[114] which is another action not required by the statute."[115] This statement by the court is not factually accurate, however, as Mr. Garr's letter never specifically demanded that Countrywide record the deed of release.[116] The letter actually only ambiguously stated that the enclosed check was "to cover the costs of filing and recording the Deed of Release," and asked Countrywide to deliver to Mr. Garr "evidence of the release."[117] The court's final enumerated defect was that nothing in Mr. Garr's August 8 letter specifically placed Countrywide on notice that the Garrs were making a demand under Section 443.130, "whether directly, by reprinting, citing, or referencing, or otherwise."[118]

Due to these drafting errors, the court held that Mr. Garr's "letter did not sufficiently track the statutory requirements of Section 443.130," and the court reversed the circuit court's judgment.[119] The court adopted its strict interpretation of the requirements of 443.130 because of the penal nature of the statute.[120] It held that "any demand letter purporting to invoke section 443.130 should closely track the language of the statute to place the mortgagee on notice that the statutory demand is being made."[121]

B. The Dissenting Opinion

In a separate dissent, Judge Teitelman, joined by Chief Justice White, strongly disagreed with the majority's interpretation of the statutory requirements for a demand letter.[122] While Judge Teitelman agreed that the penal nature of the statute required strict construction, he believed that the majority was far *too* strict in its interpretation.[123] Judge Teitelman emphasized that "[a] strict construction requires that courts 'not engraft upon the statute provisions which do not appear in explicit words or by implication from other language in the statute.'"[124] According to the dissent, the statute "requires only that a [borrower] send a demand letter to the [lender] by certified mail, return re-

114. *Id.*

115. *Id.*; MO. REV. STAT. § 443.130 (2000) (amended 2004).

116. *Garr*, 137 S.W.3d at 458-59.

117. *Id.* The letter stated, "Enclosed is a check payable to your institution in the sum of $30.00 to cover the costs of filing and recording the Deed of Release regarding the transaction. Please deliver in hand to me evidence of the release of the Deed of Trust." *Id.*

118. *Id.* at 460.

119. *Id.*

120. *Id.* at 458. *See* BCI Corp. v. Charlebois Constr. Co., 673 S.W.2d 774, 780 (Mo. 1984) (en banc).

121. *Garr*, 137 S.W.3d at 460. *See* Lines v. Mercantile Bank, N.A., 70 S.W.3d 676, 679 (Mo. Ct. App. 2002).

122. *Garr*, 137 S.W.3d at 460-62 (Teitelman, J., dissenting).

123. *Id.* at 460-61 (Teitelman, J., dissenting).

124. *Id.* at 460 (Teitelman, J., dissenting) (quoting State *ex rel.* Rogers v. Bd. of Police Comm'rs of Kansas City, 995 S.W.2d 1, 6 (Mo. Ct. App. 1999)).

ceipt requested."[125] It must also "'include good and sufficient evidence that the debt secured by the deed of trust was satisfied with good funds,'" and the borrower must advance funds for "'the expense of filing and recording the release.'"[126]

Judge Teitelman asserted that the Garrs' letter did indeed comply with all of the statutory requirements for a valid demand letter and that the letter reasonably informed Countrywide that the Garrs were requesting a deed of release under Section 443.130.[127] Furthermore, Judge Teitelman stated that banking corporations are presumed to know the law, and that the Garrs' letter was certainly sufficient to place a sophisticated nationwide lender on notice of the invocation of Section 443.130.[128]

V. COMMENT

A. Section 443.130 Prior to August 2004

Garr v. Countrywide Home Loans, Inc. is one of the latest in a long line of cases in which Missouri courts have disallowed statutory recoveries for violations of Section 443.130.[129] In the past forty years, only two reported cases have allowed a plaintiff to recover the statutory penalty for a lender's violation, and both of these cases involved relatively small amounts of money.[130] Missouri courts seem quite averse to enforcing this statute, often ruling for the lender on technical grounds, such as tendering recording costs to a refinancing lender instead of the current lender[131] or failing to mention in

125. *Id.* (Teitelman, J., dissenting); MO. REV. STAT. § 443.130.2 (2000) (amended 2004).

126. *Garr*, 137 S.W.3d at 461 (Teitelman, J., dissenting) (quoting MO. REV. STAT. § 443.130.2 (2000) (amended 2004)).

127. *Id.* at 461 (Teitelman, J., dissenting).

128. *Id.* at 462 (Teitelman, J., dissenting) (citing Round Prairie Bank of Fillmore v. Downey, 64 S.W.2d 701, 704 (Mo. Ct. App. 1933); Deal v. Bank of Smithville, 52 S.W.2d 201, 205 (Mo. Ct. App. 1932)).

129. *E.g.*, Larson v. Cendant Mortgage, Corp., 128 S.W.3d 193 (Mo. Ct. App. 2004); Devereux v. Household Mortgage Servs., Inc., 948 S.W.2d 138 (Mo. Ct. App. 1997); Murray v. Fleet Mortgage, Corp., 936 S.W.2d 212 (Mo. Ct. App. 1996); Roberts v. Rider, 924 S.W.2d 555 (Mo. Ct. App. 1996); Trovillion v. Chemical Bank, 916 S.W.2d 863 (Mo. Ct. App. 1996); Trovillion v. Countrywide Funding Corp., 910 S.W.2d 822 (Mo. Ct. App. 1995); Ong Bldg. Corp. v. GMAC Mortgage Corp., 851 S.W.2d 54 (Mo. Ct. App. 1993).

130. *See* Combs v. Gray, 769 S.W.2d 806 (Mo. Ct. App. 1989) (where the 10 percent penalty amounted to $1,170); Tedesco v. Bekker, 741 S.W.2d 896 (Mo. Ct. App. 1987) (where the 10 percent penalty amounted to $2,700).

131. Trovillion v. Countrywide Funding Corp., 910 S.W.2d 822, 824 (Mo. Ct. App. 1995).

the demand the number of days within which the lender must send its release.[132]

Courts were probably hesitant to strictly enforce the prior version of Section 443.130 because of its extremely strict time allowances and confusing requirements regarding those to whom the deed of release must be sent.[133] Lenders were allowed only fifteen business days in which to effect a release,[134] a very short time, especially for large, national lenders dealing with thousands of releases in over fifty jurisdictions.[135] To add confusion, lenders were not required to actually *record* the release but rather to send it to the person who satisfied the debt.[136] This is obviously an inefficient step. Even if the lender recorded the release, it was still liable for the penalty if it failed to send a copy of the release to the person who satisfied the debt.[137] In short, there was much potential for a lender to act in good faith and still accidentally breach the statute.

B. The Effect of Section 443.130 on Garr

In fact, acting in good faith was Countrywide's fatal flaw in *Garr*: although Countrywide complied with their request, the Garrs immediately turned around and sued Countrywide for not sending the release to them directly.[138] In effect, the Garrs invited Countrywide to send the release directly to the recorder instead, and then tried to capitalize on the strict nature of the statute to gain a windfall of $16,500.

The Garrs' actions undoubtedly were not looked upon favorably by the Missouri Supreme Court. The court was probably eager to find a reason to rule against a crafty attorney trying to make quick money by taking advantage of a technicality.[139] The *Garr* majority chose to base its decision on lack of adequate notice.[140] It held that because the Garrs' letter failed to specifically reference Section 443.130 and demanded a blanket "immediate release" of the note, it did not place Countrywide on notice that the Garrs intended to invoke the statutory penalty.[141] The court inexplicably went so far as to agree with the Garrs that "the statutory demand need not consist of any particular

132. Lines v. Mercantile Bank, N.A., 70 S.W.3d 676, 679 (Mo. Ct. App. 2002).

133. *See* MO. REV. STAT. § 443.130 (2000) (amended 2004).

134. *Id.* § 443.130.1.

135. UNIF. RESIDENTIAL MORTGAGE SATISFACTION ACT prefatory note (2004).

136. MO. REV. STAT. § 443.130.1 (2000) (amended 2004).

137. *Id.*; Garr v. Countrywide Home Loans, Inc., 137 S.W.3d 457, 459-60 (Mo. 2004) (en banc).

138. *Garr*, 137 S.W.3d at 459. *See also* Brief of Appellant/Cross-Respondent at *30, *Garr* (No. SC85578).

139. *See* Brief of Appellant/Cross-Respondent at *14, *Garr* (No. SC85578).

140. *Garr*, 137 S.W.3d at 460.

141. *Id.*

form of words";[142] however, within the same paragraph the court held that the Garrs' statutory demand was invalid because it did not contain a particular form of words.[143] It is as if the court had said, "no particular words are required as long as you use these particular words."

Although the *Garr* decision certainly avoided what appeared to have been an anecdotal injustice, the precedential backlash of the case is troublesome. In its effort to find a way to remedy an injustice, the court chose to severely complicate matters for those attempting to write notice letters in the future. As the dissent in *Garr* points out, in the vast majority of situations, the lender has far greater sophistication than the borrower, so it is very unlikely that a lender would fail to understand the ramifications of a letter demanding immediate release of a security interest.[144] Furthermore, all parties to lawsuits are conclusively presumed to know the law,[145] which should make it completely unnecessary to read further notice requirements into the statute than actually exist.

The basis for the *Garr* court's opinion is particularly unfortunate since the court could have easily disposed of Garr's claim due to the lack of evidence of payment by good funds in his August 8 letter. Mr. Garr's August 8 letter stated only that, "On August 8, 2002, I confirmed via the Countrywide Automated Customer Service Line that our loan with Countrywide Home Loans was paid in full on August 8, 2002 and that an escrow balance of $60.84 would be refunded to me."[146] The letter did not provide any proof of payment with "good funds," such as a cashier's check or money order serial number, carbon copy of a certified payment, or a bank statement showing a satisfied personal check.[147]

Invalidation on these grounds is essentially what occurred in *Martin v. STM Mortgage Co.*[148] In *Martin*, the Missouri Court of Appeals for the Western District invalidated a demand letter due to its failure to include evidence of satisfaction of the mortgage by good funds.[149] The court stated that an un-

142. *Id.*

143. *Id.* (the letter did not specifically "reprint[], cit[e], or referenc[e]" the statute).

144. *Id.* at 462 (Teitelman, J., dissenting).

145. *Id.* (Teitelman, J., dissenting). Mo. Highway & Transp. Comm'n v. Myers, 785 S.W.2d 70, 75 (Mo. 1990) (en banc); Lines v. Mercantile Bank, N.A., 70 S.W.3d 676, 681 (Mo. Ct. App. 2002) (Shrum, J., dissenting).

146. *Garr*, 137 S.W.3d at 458.

147. If Mr. Garr paid by personal check, the fact that his check had been posted on the Countrywide Automated Customer Service Line in no way showed that the mortgage had been paid with "good funds." As discussed in note 61, *supra*, a personal check is generally not considered "good funds," as it is no more than a promise to pay until such time as the bank upon which it is drawn satisfies the check. *See also* Martin v. STM Mortgage Co., 903 S.W.2d 548 (Mo. Ct. App. 1995) (holding a demand letter invalid for failure to show proof of payment with good funds).

148. 903 S.W.2d 548 (Mo. Ct. App. 1995).

149. *Id.* at 550.

certified check does not satisfy a debt until the bank upon which it was drawn actually pays it.[150] Had the *Garr* court not glazed over this issue of proof of good funds, it would have found an easy solution to the instant problem and avoided severely crippling Section 443.130 by effectively instituting a nearly impossible procedure for demanding release of a deed of trust.

The *Garr* holding, for all practical purposes, adds additional requirements of specifically referencing Section 443.130 and not speaking vaguely about specific statutory requirements in all future demand letters.[151] This is particularly disadvantageous to unsophisticated borrowers who are simply attempting to obtain marketable title to their real estate. Unless the borrower complies strictly with the *Garr* requirements by stating the precise code section and time limits, Section 443.130 will have no beneficial effect for the unsophisticated persons the statute was intended to protect.

In fact, under *Garr*, a sophisticated lender could quite easily use the court's strict interpretation of notice letter requirements as a shield, allowing the lender to take as much time as it wanted in processing a release request if the demand letter were in any way vague or noncompliant. Such improper use would turn Section 443.130 on its head, making it a tool to allow the lender to delay granting releases instead of acting as a consumer protection statute favoring borrowers.

Even more troublesome is the strong potential for class discrimination, as less sophisticated borrowers are probably less likely to seek a title company's or an attorney's help in a transaction or in drafting a demand letter. Therefore, any demand letter drafted by a less sophisticated borrower is much more likely to be ineffective. This could result in the lender acting with less swiftness in producing a release for those who need the protections of this statute the most.[152]

C. The Missouri Supreme Court Solidifies its Position

Only five months after handing down *Garr*, the Missouri Supreme Court decided *Brown v. First Horizon Home Loan Corp.*,[153] another 5-2 case involving a demand letter under the old Section 443.130. Although *Brown* was also decided under the former version of Section 443.130, unlike *Garr*, it was handed down subsequent to the effective date of revised Section 443.130.[154]

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150. *Id.*

151. *See Garr*, 137 S.W.3d at 460.

152. However, title companies handle the vast majority of these transactions and requests. In reality, demand letters are often only sent by individuals if they are looking for a windfall from the statute. *See, e.g., Garr*, 137 S.W.3d 457.

153. 150 S.W.3d 287 (Mo. 2004) (en banc). The opinion was handed down on December 7, 2004.

154. *Garr* was handed down on July 1, 2004, and the revised Section 443.130 became effective on August 28, 2004. *Garr*, 137 S.W.3d 457; MO. REV. STAT. § 443.130 (Supp. 2004).

Even though the new law was in effect, the court still chose to hold fast to the strict demand letter requirements espoused in *Garr*.

In *Brown*, Mr. and Mrs. Brown mailed a demand letter to First Horizon that was much more specific than the Garrs' letter, including a legal description of the land secured and a tracking number for the certified check used to pay off the loan.[155] But even though the Browns' letter was much more specific than the Garrs' letter, the court held the Browns' letter insufficient to invoke Section 443.130 because it did not refer to the statute or the fifteen business days for a response, did not identify the person making satisfaction, and it requested that the release be sent to the recorder of deeds.[156]

In *Brown*, Judge Teitelman wrote a dissent nearly identical to that which he wrote in *Garr*, harshly criticizing the majority's opposition to giving practical effect to the statute.[157]

The *Brown* case evidences the court's continued unwillingness to give practical effect to Section 443.130, regardless of the reasonableness of the request or the probability that the lender was actually placed on notice by a demand letter. There is no evidence that either Mr. or Mrs. Brown were attorneys or were otherwise sophisticated borrowers, and there is likewise no evidence that they were attempting to "pull a fast one" on First Horizon in order to gain a large windfall. This appears to be just the type of case which should raise alarms, where a judicially-imposed technical requirement harmed the very persons the statute was intended to protect.

D. Garr, *Notice Letters, and Revised Section 443.130*

The newly-revised Section 443.130 is much more reasonable in its requirements and penalties than the previous statute. It makes clear to whom the lender must send a release and allows the lender adequate time to investigate the situation before providing a deed of release, yet it still allows the borrower significant remedies if the lender fails to perform its duties.[158] The

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155. Brief of Appellant at *11-12, *Brown* (No. SC85773). The letter stated:

> Demand is hereby made by Kevin S. and Melody L. Brown, that full and complete release be made for the land secured by Deed of Trust for the property located at 1115 Bliss, St. Louis, Mo., dated August 30, 2001 and recorded September 14, 2001. Property recorded in Book 13272 at page 700 of the St. Louis County land records.
>
> Certified funds, in the amount of $59,550.69 to pay the loan secured by the above referenced Deed of Trust in full, were disbursed on 03-03-03, Air Borne Express, tracking #17284193953. Also enclosed please find a check in the amount of $26.00 for tender of recording fees for the Deed of release. I look forward to hearing from you.

Id.

156. *Brown*, 150 S.W.3d at 288.

157. *Id.* at 289-90 (Teitelman, J., dissenting).

158. MO. REV. STAT. § 443.130.1 (Supp. 2004) (effective Aug. 28, 2004).

most significant effect of the revision was to ease the burden on the lender and thereby decrease the potential for undeserved windfalls occurring even when a lender acts in good faith.

The Missouri General Assembly adopted the revisions to Section 443.130 on June 14, 2004.[159] As discussed previously, these revisions make the statute much more balanced between lender and borrower than the previous statute. Unfortunately, just seventeen days later, on July 1, 2004, the Missouri Supreme Court handed down its decision in *Garr* and opened a major gap in the statute's effectiveness.[160] Under *Garr*, it is much less practical to even *invoke* Section 443.130, as a notice letter must now specifically reference the statute and may not deviate from the language of the statute in any way.[161] In future litigation, a defendant lender could quite viably argue that nearly any statement (such as the Garrs' demand of an "*immediate* release") other than a statutory quotation is a deviation from the statute[162] and therefore makes the notice invalid. Thus, while the Missouri General Assembly was attempting to revise the statute to make it more reasonable for all parties, the Missouri Supreme Court was establishing precedent that could undermine the revision. In fact, since this case was handed down, lower courts have begun to apply *Garr*'s narrow reading of the old, deeply flawed statute to the revised language of Section 443.130.[163] The extreme technicalities now required in drafting a demand letter have rendered the new, more rational statute nearly powerless. Such overprotective measures in favor of lenders are no longer necessary with the revised statute, and the scale is now tipped heavily in the lenders' favor.

E. How Should Missouri Remedy Section 443.130's Problems?

It appears from the revision of Section 443.130 that the legislature intended not to reduce or eliminate incentives for lenders to act quickly, but rather to lessen their burdens and thereby encourage them to comply with the statute. The statute, as written, would be very well-balanced between the interests of both parties if it were easy for the borrower to invoke. It no longer has unreasonably short time requirements with which the lender must comply or exorbitant statutory penalties that the lender must pay in the event of noncompliance. However, if the legislature intended the statute to have any practical effect, it must be reasonably possible for a borrower to invoke the statute. Due to the damage done by *Garr* in complicating the release process, the

159. Act of June 14, 2004, No. 959, § A, 2004 Mo. Legis. Serv. 10 (West)

160. Garr v. Countrywide Home Loans, Inc., 137 S.W.3d 457 (Mo. 2004) (en banc).

161. *Id.* at 460.

162. *Id.*

163. *See* Brown v. First Horizon Home Loan Corp., 150 S.W.3d 287 (Mo. 2004) (en banc).

legislature should act to remedy the situation and once again make it straightforward for the average borrower to invoke his statutory remedy.

The Missouri General Assembly could most easily remedy the situation in one of two ways.[164] First, at least thirteen states do not require any written notice whatsoever to invoke their release statutes.[165] Under these statutes, the full satisfaction of the debt is enough to set the statute in motion.[166] The Missouri legislature could simply remove all requirements for a written notice and make the satisfaction speak for itself. In such a situation, the lender should still have more than ample notice that it must issue a release, as the lender will receive either the final check or, in the case of a secondary market mortgage lender, will be notified by the servicer that full payment has been received.

While this would substantially reduce the risk of less sophisticated or less affluent borrowers being denied recourse under the statute due to their ignorance of the law or lack of access to counsel, it could, and probably would, lead to lender dissatisfaction because lenders would have no actual notice of where they should send a release. Such a situation would leave the law no better off than before as the number of disputes would probably increase, and this is certainly not the goal of any effective statute.

Secondly, and much more appropriately, the legislature could enact a revision to the current statute explicitly stating that reference to the statute is not necessary to validate a notification letter. This revision should specifically enumerate what must be in a notice letter to make it valid. The legislature could easily include a sample form in the statute so that a borrower could simply fill in the blanks and send a notice to the lender. Such a form could be substantially in the following format:[167]

DEMAND FOR DISCHARGE OF MORTGAGE/DEED OF TRUST

The undersigned, _____ [*name*], of _____ [*address*], City of _____, County of _____, State of Missouri, pursuant to MO. REV. STAT. §§ 443.060 and 443.130, demands that within thirty days from the date of this demand that you cause a satisfaction of mortgage, stating that such mortgage has been paid in full, satisfied, and dis-

164. While the Uniform Act at first appears to be a wise solution, its adoption would not remedy Missouri's problems, as nothing in the Act explicitly states that a letter need not specifically reference the statute. *See* UNIF. RESIDENTIAL MORTGAGE SATISFACTION ACT (2004). The precedent of *Garr* and similar cases would continue to loom over any such enactment and require strict adherence to the language of the statute and citation to the statute.

165. RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 6.4 cmt. c, tbl. (1997); UNIF. RESIDENTIAL MORTGAGE SATISFACTION ACT prefatory note.

166. UNIF. RESIDENTIAL MORTGAGE SATISFACTION ACT prefatory note (2004).

167. *See* 18 AM. JUR. *Pleading & Practice Forms Mortgages* § 25.

charged, to be recorded in the appropriate records of the County of _____, State of Missouri.

The undersigned states that the mortgage has been satisfied with good funds, and has attached evidence of such to this letter. The funds were transferred by _____ [*wire transfer, cashier's check, cash, etc.*] on _____ [*date*], with reference number _____ [*cashier's check number, etc.*].

The mortgage referenced by this letter is reference number _____ [*loan number, reference number, etc.*], originally obtained through _____ [*name of original bank or other lender*], and secures property located at _____ [*address or legal description*].

The undersigned further demands that you deliver to the undersigned at the above-stated address the mortgage, the promissory note so secured, and _____ [*indicate any other evidences of indebtedness secured by the mortgage*].

Dated: _____.

[*Signature*]

[*proof of Payment with Good Funds attached*]

This solution would ensure that even the least-sophisticated borrower would be entitled to a prompt release. Borrowers could easily obtain such a model form from their bank or lender upon informing the lender that they plan to pay off their debt. Lenders could even be required to distribute a copy of such a model form each time they close on a piece of residential property. No longer would a borrower have to worry about each individual word in the letter and whether it would invalidate the notice. No longer would a lender be able to take cover under *Garr* and use any miniscule deviation from the statute in a notice letter as an excuse to drag its feet in issuing a release. A simple statutory form letter would return Section 443.130 to its original purpose.

By taking this simple step, the Missouri legislature could remove much of the confusion and uncertainty surrounding Section 443.130 and force lenders to act appropriately and promptly in releasing security instruments.

VI. CONCLUSION

In light of the recently enacted revised Section 443.130, the Missouri Supreme Court's holding in *Garr v. Countrywide Home Loans, Inc.*[168] took a

168. 137 S.W.3d 457 (Mo. 2004) (en banc).

misguided step away from fairness and equality in the procurement of deeds of release. *Garr* made drafting a sufficient notice letter under Section 443.130 far more difficult at essentially the same time as the Missouri General Assembly was attempting to empower borrowers to sue under the statute. Until the legislature changes the requirements for a notice letter, borrowers and their attorneys should be extremely careful in drafting such a letter, being sure to reference the statute and specifically track its terms in excruciating detail. In order to allow the revised section to take practical effect, the Missouri General Assembly should enact a model notice letter and explicitly state that failure to cite or reference the statute does not make the notice fail. Because Missouri courts appear to be entrenching themselves in a pro-lender agenda on this statute, the only viable way for borrowers to obtain the relief they desire is to use their political muscle and petition the legislature for a statutory solution.

ERIC E. BOHL